

No. 89-1836

Supreme Court, U.S.

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**In The
Supreme Court of the United States
October Term, 1989**

DOMINIC P. GENTILE,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Nevada**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Nevada Supreme Court Rule 177, a parallel to ABA Model Rule 3.6, is constitutionally permitted against First Amendment challenge as a means for advancing the state's interest in the promotion of the administration of justice and fairness of trials, as applied in imposing a private reprimand upon a criminal defense lawyer for holding a press conference and making extrajudicial statements found to have a substantial likelihood of materially prejudicing an adjudicative proceeding.

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BRIEF IN OPPOSITION

The State Bar of Nevada, the Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the Supreme Court of Nevada that was filed on May 22, 1990, by Dominic P. Gentile, the Petitioner.

STATEMENT OF THE CASE

The Petitioner, Dominic P. Gentile, is a criminal defense attorney in Las Vegas, Nevada. He was

disciplined by a private reprimand for a violation of Nevada Supreme Court Rule 177 relating to pre-trial publicity.

Dominic Gentile represented Grady Sanders in the defense of an eleven count Clark County Grand Jury indictment charging Sanders with grand larceny, trafficking in narcotics and racketeering. On February 5, 1988, on the day of Sanders' arraignment, Gentile held a press conference attended by electronic and print media. Gentile made statements to the press regarding a then pending criminal case, entitled, *State of Nevada vs. Grady Sanders*, Case No. C 81299.

During the press conference, Gentile made the following comments:

1) "Grady Sanders is an innocent person and had nothing to do with any of the charges," Pet., p. 8a;

2) "The person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers' Checks, is Detective Steve Scholl," Pet., p. 8a;

3) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers' Checks than any other living human being," Pet., p. 8a;

4) "I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police Department and at the District Attorney's office," Pet., p. 8a;

5) "The so-called other victims, one, two-four of them are known drug dealers and convicted money launderers," Pet., p. 8a;

6) "Now, up until the moment, of course, that the other victims started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now you can believe them," Pet., pp. 8a, 9a;

7) "I know I represent an innocent man," Pet., p. 12a;

8) "I'll tell you this: you're going to learn throughout these proceedings that the cops gave some of the cocaine away, which is totally unheard of, but gave away cocaine samples to people that they were trying to set up," Pet., p. 13a;

9) "We've got some videotapes that if you take a look at them, I'll tell you what, he (Steve Scholl) either had a hell of a cold or should have seen a better doctor," Pet. p. 14a.

Gentile knew that Detective Scholl would be a prosecution witness at Sanders' trial and he also believed that the "other victims" would be called as witnesses by the prosecution at trial. App., p. 4a.

The State Bar of Nevada presented a grievance to a three member Screening Panel (two attorneys and one laymember) who referred the matter for a formal disciplinary hearing. On December 6, 1988, the State Bar of Nevada filed a one count complaint against Dominic Gentile alleging a violation of Supreme Court Rule 177. App., pp. 1a, 2a.

On April 17, 1989, a five member Hearing Panel (four lawyers and one laymember) heard the evidence and viewed the videotape of the press conference and later found that Gentile violated Nevada Supreme Court Rule

177 in connection with his extrajudicial statements made to the press. Gentile referred to the innocence of his client. Gentile attacked the integrity of the criminal investigation and the credibility of prosecution witnesses. Gentile also commented on subjects, including polygraph tests, that he knew would not be admissible at the time of trial.

The Southern Nevada Disciplinary Board recommended the issuance of a private reprimand. Gentile appealed to the Nevada Supreme Court. The Court affirmed the decision by a vote of 4 to 0, Chief Justice Cliff Young having voluntarily disqualified himself from considering the case.

REASONS FOR DENYING THE WRIT

This case is not appropriate for review by this Court, for the following reasons.

1. **The Petition Attempts To Relitigate, In This Court, Factual Issues Decided Upon Questions Of State Law, Which Do Not Warrant Further Constitutional Review.**

While an attorney does not surrender the right to freedom of speech upon admission to the Bar, the attorney takes on an added responsibility, that of being an officer of the court with a duty to assist in the administration of justice and to refrain from actions which would result in the denial to any party of a fair and impartial trial. This responsibility must be balanced against the attorney's right of free speech. As stated in *Sheppard v.*

Maxwell, 384 U.S. 333 (1966), "Restrictions on an attorney's speech must reflect a balance between the interests of the public, the judiciary and the parties."

The disciplinary rules have been designed to provide a balancing test for these frequently competing interests of fair trial and free speech. Nevada Supreme Court Rule 177 was closely tailored to ABA Model Rule 3.6, which replaced DR7-107 in addressing the question of trial publicity. *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, Hazard, Vol. I, 1987 Supplement, p. 393.

Under the old provisions of DR7-107, the rule listed statements which were prohibited and statements which were permitted at various stages of the legal proceedings. It generally attempted to prohibit statements that were reasonably likely to interfere with a fair trial. The old standard was criticized by some courts as being vague or overbroad under the First Amendment. In drafting a new rule, ABA Model Rule 3.6, an attempt was made to meet this criticism. The first paragraph is designed to be analogous to a clear and present danger test. *The Law of Lawyering*, *id.* at 395. It prohibits statements that the lawyer reasonably should know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding." In the case of *In re Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), this Court said: "Courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Court invoked the

abstention doctrine so that a State Bar disciplinary hearing could be held involving attorney Hinds against interference by the Federal Courts.

At the start of a criminal trial, Hinds, a New Jersey attorney, took part in a press conference, making statements critical of the trial and of the trial judge's judicial temperament and racial insensitivity. Hinds referred to the criminal trial as a "travesty," a "legalized lynching," and "a kangaroo court." This Court held: "The State [of New Jersey] has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. . . . The State's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance."

Nevada Supreme Court Rule 177, adopted on March 28, 1986, promotes the trial of cases in the courtroom rather than in the airwaves. The Rule reads:

Rule 177.

Trial Publicity.

1. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness or the expected testimony of a party or witness;

(b) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(c) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(e) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(f) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty . . .

The petition asserts that Gentile's statements were protected speech. Pet., pp. i, 8. An analogy to the speech of public officials and to lawyer advertising is made for the purpose of suggesting that Gentile's statements

should be afforded the same measure of constitutional protection.

Petitioner claims that he held a public press conference about police misconduct, in which he had a sound factual basis for the allegations. Pet., p. 9. This statement confuses the real issue in that the press conference's principal purpose was not about police misconduct or corruption but rather about Gentile's upcoming trial presentation and Grady Sanders' professed innocence. Indeed, it was more analogous to a forum for advancing a lawyer's personal interests in fame and notoriety than in exposing police misconduct.

Gentile's admitted purpose for calling the press conference was (i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) to attempt to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case. App., p. 4a.

Gentile could have utilized alternate forums for pursuing his grievance against police misconduct. The police department's internal affairs division or the City Council would have been appropriate reviewing bodies for Gentile's complaint. Even discussions with the media after the conclusion of the Sanders litigation would have avoided the threat of prejudicial influence to Sanders' criminal trial. There is nothing more than an unsupported suggestion that Gentile's motive for holding the February 5, 1988, press conference was to expose police misconduct.

2. The Nevada Supreme Court's Unanimous Decision Is Sound On The Merits And Does Not Conflict With Other Cases Requiring This Court's Exercise Of Discretionary Jurisdiction.

The Nevada Supreme Court correctly held that Supreme Court Rule 177 is constitutional by having rejected the Petitioner's constitutional challenges under either the federal or Nevada constitutions. The court found that Mr. Gentile's comments to the press "had a substantial likelihood of materially prejudicing the adjudication of his client's case." Pet., p. 4a.

The petition asserts that because there was no actual prejudice to the criminal proceeding, there was no harm caused by his comments. Pet., p. 8. The Nevada Supreme Court countered this position by indicating that "absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice." Pet., p. 4a.

A reasonably prudent standard is used in the context of Supreme Court Rule 177. The "knows or reasonably should know" standard relates to that which a person of reasonable prudence and intelligence ought to know given the like conditions and circumstances. Herein, Gentile, after having researched the ethical issues, should have known that his comments were substantially likely to prejudice the criminal proceedings. Especially, in light of the notoriety of Mr. Sanders' criminal case, a reasonable attorney would have taken appropriate precautions to guard against making virulent and vituperative remarks that in and of themselves tend to sway public opinion by instilling a prejudicial influence.

The petition claims that the different standards used by state courts and licensing authorities leave lawyers uncertain about their ethical obligations. Pet., p. 9. The three standards often used are: clear and present danger, serious and imminent threat, and reasonable likelihood of interference.

Although the language used is different, the conflict created is more semantical than real. The two cases cited by the Petitioner, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) ("serious and imminent threat") and *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) ("reasonable likelihood") arose on pre-enforcement review of DR7-107, a type of review that this Court discouraged in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). There was no disciplinary hearing held in either the Chicago Council or Hirschkop case, which is distinguishable from the present case.

In the case of *In re John Zimmerman v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn. 1989), cert. denied, 109 S.Ct. 3160 (1989), the Tennessee Supreme Court found no constitutional problem with a state disciplinary rule that bars lawyers in criminal proceedings from making public comments on matters such as the accused's guilt or innocence, the evidence, and/or merits of the case. In *Zimmerman, supra*, the conduct of a prosecutor in discussing trial matters was not done with any malicious intent nor done with the intent to interfere with the right to a fair trial of any of the defendants. In upholding a private reprimand, the court cited *In re Rachmiel*, 449 A.2d 505 (N.J. 1982), which held that attorneys are appropriately subject to carefully tailored

restraints on their free speech. The prohibition applied only to speech that is reasonably likely to interfere with or affect a fair trial. "Lawyers have an obligation to maintain the highest standards of ethical conduct," *Zimmerman*, at p. 761. Mr. Gentile had an equally compelling ethical obligation, which he ignored.

The Petitioner also suggests that courts have remedies such as extensive voir dire, change of venue, jury sequestration, or trial postponement to resolve the conflict between free speech and fair trial interests. Pet., p. 13. This proposition does not lend itself to judicial economy and the effective administration of justice if courts must make extensive inquiry as to the harm caused to each case on the docket due to pre-trial or trial press conferences.

Courts that are often confronted with the dilemma of changing venue or postponing trials in criminal matters do so to insure that the accused is given a fair trial. The Gentile matter, however, is a state disciplinary case, which attempts to enforce ethical standards that have been established to avoid these problematic areas. With the explosion of litigation, relaxation of the trial publicity regulation would only foster additional layers of work for courts that are presently overly burdened.

Lastly, the petitioner maintains that Nevada Supreme Court Rule 177 is vague and overbroad. Pet., pp. 14-17. A statute that is vague is generally confusing or nebulous so that an average person does not realize that the conduct he or she is engaging in is prohibited. A reasonably prudent person standard is applied in this case, which is

widely recognized and applied in the criminal and civil setting.

In the Matter of Disciplinary Proceedings Against Alan D. Eisenberg, 423 N.W.2d 867 (Wis. 1988), the Supreme Court of Wisconsin upheld the constitutionality of a similar rule patterned after ABA Model Rule 3.6. Eisenberg represented a woman charged with arson and the murder of her husband. Following the filing of a criminal complaint and prior to trial, Eisenberg held four separate interviews with reporters wherein "he felt compelled to help what he called a beautiful person who was also an abused woman and whose husband was a known hell-raiser, an alcoholic, and a wife beater, and I'll tell the jury what a rotten no-good son-of-a-bitch he was!" Mr. Eisenberg did not limit his attacks to the victim but also against the court, opposing counsel and a state trooper/witness.

The court in *Eisenberg* at p. 871 rejected a claim that the disciplinary rule in question acted as a "blanket prohibition" on pre-trial statements. The rule included explicit standards with a list of prohibited statements. Wisconsin's rule SCR 20:3.6 is indential to Nevada Supreme Court Rule 177.

Disciplinary problems arose in the Gentile case not because the statute is vague or overbroad but because Mr. Gentile misapplied the rule or failed to distinguish advocacy from potential prejudicial interference. Mr. Gentile was afforded sufficient consideration of the mitigating effect of his research efforts prior to the press conference by both the disciplinary board and the Nevada Supreme Court who imposed a private reprimand; whereas in

Eisenberg, supra, Mr. Eisenberg was given a two year suspension.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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(702) 382-0502

Counsel Of Record For Respondent

APPENDIX

CASE NO. 88-43-82

STATE BAR OF NEVADA

SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA,)	
)	
Complainant,)	
vs.)	COMPLAINT
DOMINIC P. GENTILE,)	
)	
Respondent.)	
<hr/>		

TO: DOMINIC P. GENTILE
302 E. CARSON AVE. #600
LAS VEGAS, NEVADA 89101

PLEASE TAKE NOTICE that pursuant to Supreme Court Rule (SCR) 105.2 a response to this complaint must be filed with the Southern Nevada Disciplinary Board Chairman, Donald J. Campbell, Esq., 300 S. 4th Street, Suite 1009, Las Vegas, Nevada 89101, and a copy must be served on John E. Howe, Esq., Bar Counsel, State Bar of Nevada, 500 S. 3rd Street, Suite 2, Las Vegas, Nevada 89101, both within twenty (20) days of service of this Complaint.

Complainant, State Bar of Nevada, by and through its Bar Counsel, John E. Howe, alleges that Respondent, Dominic P. Gentile, is now and at all times pertinent herein was, a licensed and practicing attorney in the state of Nevada, having his principal place of business for the practice of law in Clark County, Nevada, and that he engaged in acts of misconduct warranting the imposition of professional discipline as set out herein:

COUNT 1: On February 5, 1988, Respondent held a press conference attended by television and newspaper reporters. Respondent made statements to the press regarding a then pending criminal case in which he was attorney of record for defendant, Grady Sanders. Respondent's statements on the pending criminal case were of a nature which he knew, or reasonably should have known, would have a substantial likelihood of materially prejudicing the adjudicative proceedings in the case of the State of Nevada v. Grady Sanders. Respondent's said conduct was in violation of Supreme Court Rule (SCR) 177.

WHEREFORE, Complainant prays as follows:

1. That a hearing be held pursuant to Nevada Supreme Court Rule (SCR) 105;
2. That Respondent be assessed the costs of the disciplinary proceeding pursuant to Supreme Court Rule (SCR) 120.1; and
3. That pursuant to Supreme Court Rule (SCR) 102, such disciplinary action be taken by the Disciplinary Board for the Southern District of Nevada against Respondent as may be deemed appropriate under the circumstances.

DATED this 6th day of December, 1988.

STATE BAR OF NEVADA

By: John E. Howe
JOHN E. HOWE
 Bar Counsel
 500 S. 3rd Street #2
 Las Vegas, Nevada 89101
 (702) 382-0502

STATE BAR OF NEVADA
 SOUTHERN NEVADA DISCIPLINARY BOARD

STATE BAR OF NEVADA,)	
)	
Complainant,)	Case No.
vs.)	88-43-82
DOMINIC P. GENTILE,)	
)	
Respondent.)	
_____)	

FINDINGS AND RECOMMENDATION

FINDINGS OF FACT

The Respondent, Dominic P. Gentile ("Gentile") was retained to represent Grady Sanders in late 1987 in connection with alleged criminal activity by Mr. Sanders. Mr. Sanders was indicated by the Clark County Grand Jury on February 4, 1988 on charges relating to the theft of a large quantity of cocaine and travellers checks. On February 5, 1988 - the day following the indictment of Mr. Sanders - Gentile held a press conference which was attended by members of the electronic and print media. A complete videotape and verbatim transcript of the press conference were introduced into evidence in this matter. At the press conference Gentile made the following statements:

- (i) "... the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being levelled against him, but that the person that was in the most direct position to have

stolen the drugs and the money, the American Express Traveller's checks, is Detective Steve Scholl."

(ii) "There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Traveller's checks than any other living human being."

(iii) "Now, with respect to these other charges that are contained in this indictment, the so-called other victims, as I sit here today I can tell you that one, two - four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn't say a word about anything until after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something."

(iv) "Now, up until the moment, of course, that [the other victims] started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them."

(v) "I think Grady Sanders was indicted because he - he was a scapegoat the day they opened the [safe-deposit] box."

(vi) "We've got some video tapes that if you take a look at them, I'll tell you what, he [Detective Scholl] either had a hell of a cold or he should have seen a better doctor."

Gentile knew that Detective Scholl would be a prosecution witness at Mr. Sanders' trial and he also believed that the "other victims" would be called as witnesses by the prosecution at that trial.

Gentile's admitted purpose for calling the press conference was (i) to counter public opinion which he perceived as adverse to Mr. Sanders, (ii) to attempt to refute certain matters regarding his client which had appeared in the media, (iii) to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and (iv) to publicly present Sanders' side of the case. As such, there was a substantial likelihood that the statements would materially prejudice the Sanders trial, which had been scheduled for August, 1988.

Prior to holding the press conference, Gentile conducted research on the question of what statements, if any, he was ethically permitted to make at the press conference. During the press conference, Gentile refused to comment on certain matters because he did not believe it ethically proper to do so.

On or about December 6, 1988 the State Bar of Nevada filed a complaint against Gentile alleging that the statements made by him at the February 5, 1988 press conference violated Supreme Court Rule 177. Gentile answered the complaint on January 13, 1989 denying that his actions violated the rule, and alleging several affirmative defenses.

CONCLUSIONS OF LAW

Supreme Court Rule 177 provides, *inter alia*, as follows:

1. A lawyer shall not make an extrajudicial statement that a reasonable person would

expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

2. A statement referred to in subsection 1 ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(a) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation, or witness, or the identity of a witness, or the expected testimony of a party or witness;

* * *

(d) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

The statements made by Gentile violated SCR 177(1), (2)(a) and (2)(d) in that they were statements which Gentile knew would be disseminated by means of public communication; which (i) related to the character, credibility, reputation and criminal record of witnesses in the trial of Mr. Sanders, and (ii) contained an opinion of the guilt or innocence of Mr. Sanders; and were known or should have been known by Gentile to have a substantial likelihood of materially prejudicing the Sanders trial.

SCR 177 does not violate either the United States or the Nevada constitution. The State Bar has not engaged in any unequitable conduct, nor has it applied SCR 177 in a selective manner.

Gentile's statements at the press conference went beyond the scope of the statements permitted by SCR 177(3).

RECOMMENDATIONS

The Southern Nevada Disciplinary Board recommends that Gentile be issued a private reprimand.

DATED this 12th day of May, 1989.

Southern Nevada Disciplinary Board,
DONALD J. CAMPBELL, Chairman

/s/ Dennis L. Kennedy
DENNIS L. KENNEDY,
Chairman of
Disciplinary Panel
